(3)

Supreme Court, U.S.
FILED
FEB 15 1995
OFFICE OF THE CLERK

No. 94-926

IN THE

Supreme Court of the United States

October Term, 1994

UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 951, AFL-CIO AND CLC,
Petitioner,

NATIONAL LABOR RELATIONS BOARD,
Intervenor,

vs.

PHILLIP MULDER, CHARLES BUCK,
and LEON GIBBONS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TED IORIO
Counsel of Record
CHRISTINE A. REARDON
KALNIZ, IORIO & FELDSTEIN, CO., LPA
5550 West Central Avenue
Toledo, Ohio 43635-2170
Telephone: (419) 537-1954

Attorneys for Petitioner

BATAVIA TIMES PRINTING INC.—Telephone (716) 344-2000

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTRODUCTION 2
ARGUMENT 3
CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

A T & T Technologies, Inc. v. CWA, 475 U.S. 643 (1986) 6,7

Abrams v. Communication Workers of America, 818 F.Supp. 393 (D.D.C. 1993) 6,7

Balowski v. International Union UAW, 372 F.2d 829 (6th Cir. 1967) 7

Chicago Teachers Union v. Hudson, 475 U.S. 307 3,5

Communication Workers of America v. Beck, 487 U.S. 735 (1988) 2

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 7

Gateway Coal Co. v. Mineworkers, 414 U.S. 368 (1974) 7

Hohe v. Casey, 956 F.2d 399 (3rd Cir. 1992) 5

Hudson v. Chicago Teachers Union, 922 F.2d 1306 (7th Cir.), *cert. denied*, _____ U.S. _____, 111 S.Ct. 2852 (1991) 4,5,6

Humphrey v. Moore, 375 U.S. 335 (1964) 7

Kidwell v. Transportation Communications International Union, 946 F.2d 283 (4th Cir. 1991), *cert denied*, _____ U.S. _____, _____ S.Ct. _____, 118 L.Ed.2d 423 (1992) .. 3,4,

Litton Financial Printing, _____ U.S. _____, 111 S.Ct. 2215 (1991) 6

Monroe v. UAW, 723 F.2d 22 (6th Cir. 1983) 7

Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982) 5

Steel Workers v. Rawson, 495 U.S. 362 (1990) 7

Tierney v. City of Toledo, 917 F.2d 927 (6th Cir. 1990) 3

Vaca v. Sipes, 386 U.S. 171 (1967) 2,6

Statutes and Rules:

42 U.S.C. §1983 3,5

§301 of the Labor Management Relations Act, 29 U.S.C. §185 2,8

No. 94-926

IN THE

Supreme Court of the United States

October Term, 1994

UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 951, AFL-CIO AND CLC,
Petitioner,

NATIONAL LABOR RELATIONS BOARD,
Intervenor,

vs.

PHILLIP MULDER, CHARLES BUCK,
and LEON GIBBONS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petitioner, United Food and Commercial Workers Local 951, AFL-CIO and CLC, respectfully submits the following Reply to Respondents' Brief in Opposition to the above-captioned Petition for a Writ of Certiorari.

INTRODUCTION

The standard for breach of the duty of fair representation serves as the foundation for any non-member complaint regarding the obligation to remit union service fees. *See Communication Workers of America v. Beck*, 487 U.S. 735, 762-763 (1988).

Union service fee arbitrations are subject to the analytical framework dictated by the duty of fair representation. Hence, the standard for evaluation of any aspect of non-member union service fee collection is whether the union has acted in an arbitrary, capricious or bad faith manner. *See Vaca v. Sipes*, 386 U.S. 171 (1967). This petition presents a case of first impression, to determine whether §301 of the Labor Management Relations Act, 29 U.S.C. §185, confers federal jurisdiction to confirm, modify or vacate service fee arbitration awards issued pursuant to *Communication Workers of America v. Beck's* mandate. The arguments set forth in Respondents' Brief focus upon the role of consent in arbitration, and compel this Court to address two fundamental issues with respect to whether §301 jurisdiction is warranted: (1) what is the role of arbitration in non-member service fee disputes in general? and (2) in the unique context of the duty of fair representation, are traditional notions of "consent" to arbitration inapplicable? The following brief reply will illustrate that Respondents' reliance upon the issue of consent is misplaced in the context of private sector fee arbitration.

ARGUMENT

The intended role of arbitration is best illustrated in the analogous law of the public sector, wherein non-union member constitutional rights must be protected against state action. In *Kidwell v. Transportation Communications International Union*, 946 F.2d 283, 303 (4th Cir. 1991), *cert denied*, _____ U.S. _____, _____ S.Ct. _____, 118 L.Ed.2d 423 (1992), the United States Court of Appeals for the Fourth Circuit provided a concise summary of the public sector's judicial path toward upholding the integrity of fee arbitration.[1] It is evident from the *Kidwell* court's analysis that the courts may reserve jurisdiction over any constitutional issues that may arise. However, if the arbitration procedure itself is constitutional on its face and as implemented, then there will not likely be any residual grounds for judicial challenge pursuant to 42 U.S.C. §1983. For example, the *Kidwell* court notes that, in *Chicago Teachers Union v. Hudson*, this Court required unions to "provide for a reasonably prompt decision by an impartial decision maker," and established the constitutional minimums for such a procedure, adding that the "arbitrator's decision would not receive preclusive effect *in any subsequent §1983 action.*" (Emphasis added). *See Kidwell*, 946 F.2d at 283, citing *Chicago Teachers Union v. Hudson*, 475 U.S. at 307, 308 n. 21. It follows that only a residual constitutional violation would trigger a §1983 action.

The *Kidwell* court also noted that the Sixth Circuit, in *Tierney v. City of Toledo*, 917 F.2d 927 (6th Cir. 1990) did not require exhaustion of

[1] In *Kidwell*, the Fourth Circuit declined to rule upon the issue of arbitration in view of dismissal of the case on other grounds.

arbitration prior to bringing *constitutional* claims in federal court (though the Court did not define a "constitutional claim"). *See Kidwell*, 946 at 303, *citing Tierney*, 917 F.2d at 940. The *Kidwell* court quoted most extensively from *Hudson v. Chicago Teachers Union*, 922 F.2d 1306 (7th Cir.), *cert. denied*, _____ U.S. _____, 111 S.Ct. 2852 (1991), in the following analysis:

> [T]he court [of appeals] stated that judicial review without prior arbitration was limited to ensuring that the proper procedure—fair share notice, an impartial decision maker to determine fee amount, and escrow protection—was followed. [922 F.2d] at 1314. '[T]he singular role of the federal courts in reviewing the adequacy of fair share notice is to determine whether the notice gives the non-union members enough information to challenge the basis for the fee.' *Id.* It noted that, if the decision on fee calculation was adverse to the plaintiffs, they could seek review in the federal courts. *Id.* It refused to become involved in more specific determinations and micromanagement prior to arbitration.

See Kidwell, 946 F.2d at 303. Significantly, the Seventh Circuit's *Hudson* decision does not mention any individualized "consent" to arbitration by the objecting non-union members.

The *Kidwell* court's gathering of precedents on the issue of fee arbitration highlights several key elements in the judicial policy underlying fee arbitration—elements which the Respondents disregard. First, the very fact that this Court established constitutional guidelines for fee

arbitration procedures is itself significant.[2] Further, the fact that the federal courts retain residual jurisdiction over constitutional (*i.e.* §1983) claims is secondary to the goal that a facially constitutional procedure, constitutionally implemented, should leave behind *no* residual constitutional claims for the courts to adjudicate.[3] Hence, the Seventh Circuit specifically directed arbitration first, and judicial review second.[4]

Applying the analogous law of the public sector to the facts presented, if a private sector arbitration procedure conforms facially to the duty of fair representation, and is implemented in accordance with the duty of fair representation, then said procedure should be entitled to the same deference afforded any other labor arbitration proceeding undertaken under the duty of fair representation. The Respondents' "choice of fora" argument presumes that *all* union service fee calculations *will* violate the duty of fair representation. This "presumption" is evident from Respondents'

---

[2] *See Chicago Teachers Union v. Hudson*, 475 U.S. at 310.

[3] The same reasoning renders Respondents' citation of *Hohe v. Casey*, 956 F.2d 399 (3rd Cir. 1992) inapposite. *Hohe*, a public sector case, premises its rejection of the arbitration procedure upon the prohibition against exhaustion requirements in §1983 cases. *See e.g. Patsy v. Board of Regents of Florida*, 457 U.S. 496, 516 (1982); *Hohe*, 956 F.2d at 408, 409. Petitioner does not dispute that *constitutional* issues will always have a forum in the federal courts, notwithstanding the existence of arbitration procedures. However, this point presumes that constitutional issues remain as a result of the drafting or implementation of the arbitration procedure.

[4] *See Hudson v. Chicago Teachers Union*, 922 F.2d 1306 at 1314.

unwillingness to even countenance the possibility that the duty of fair representation (a far lesser standard than the constitutional standard found in the public sector) could ever be met through a fairly conducted arbitration procedure.

It is clear from the analogous law of the public sector, emanating from this Court's decision in *Hudson*, that constitutional guidelines for fee arbitration procedures were not established merely to provide a costly and meaningless prelude to litigation. If such procedures can adequately protect the constitutional rights of public sector objectors, while, at the same time, eliminate the need for courts to "micromanage" fee calculations, then it is clear that arbitration of fee disputes in the public sector was intended to carry some meaningful effect.

Respondents' Brief avoids discussion of the proper foundation for analysis—to wit: whether a union has acted in an arbitrary, capricious or bad faith manner toward a non-member. *See Vaca v. Sipes*, 386 U.S. 171 (1967). The unique context of fee-arbitration, in view of the duty of fair representation standard, renders inapposite the Respondents' reliance upon *A T & T Technologies, Inc. v. CWA*, 475 U.S. 643 (1986) and *Litton Financial Printing*, _____ U.S. _____, 111 S.Ct. 2215 (1991). The decision of the District Court for the District of Columbia in *Abrams v. Communication Workers of America*, 818 F.Supp. 393 (D.D.C. 1993), is also unpersuasive for its reliance upon the same precedents. The *Abrams* court's characterization of the fee dispute resolution process before it as "forced arbitration" ignores the judicially affirmed role of arbitration in service fee

disputes, and makes an inappropriate analogy to employer/union arbitration agreements. The *Abrams* court erroneously concluded, as do Respondents, that cases such as *Gateway Coal Co. v. Mineworkers,* 414 U.S. 368 (1974) and *A T & T Technologies,* require the consent of non-union members to service fee arbitrations. However, in *Gateway Coal* and *A T & T Technologies,* the "no strike" clause, and other significant consideration, serve as the contractual *quid pro quo* for the grievance arbitration mechanism between the employer and the union.

Respondents dwell extensively on the issue of individualized consent, even though "lack of consent" is not even addressed as a significant issue in public sector decisions which are subject to the higher constitutional standard. Consent is even less of an issue under the standard for duty of fair representation. The decisions of this Court, long followed, have afforded unions "a wide range of reasonableness" in the dispatch of the duty of fair representation. *See e.g. Steel Workers v. Rawson,* 495 U.S. 362 (1990); *Humphrey v. Moore,* 375 U.S. 335 (1964) and *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953). Indeed, in the context of the duty of fair representation, employees are required to exhaust the grievance procedure even though said employees, as "individuals," might prefer to have their cases heard directly in the federal courts without having to exhaust arbitration. *See Monroe v. UAW,* 723 F.2d 22 (6th Cir. 1983). Indeed, a union may be deemed to have fully executed its duty of fair representation even where it *refuses* to arbitrate. *See Balowski v. International Union UAW,* 372 F.2d 829 (6th Cir. 1967). A union's

processing of any type of grievance or dispute to arbitration in good faith fully complies with the duty of fair representation.

Thus, Respondents' focus on the "choice of fora" issue begs the question of whether a fairly drafted and fairly implemented arbitration procedure will even leave behind a residual duty of fair representation question to be litigated in any forum. It is entirely appropriate and consistent with prior case law governing the duty of fair representation that a grievance procedure may serve to fully discharge the duty of fair representation if appropriately drafted and administered. Accordingly, said arbitration award should be entitled to the same statutory appeal mechanism as other arbitration awards emanating from the federal policy of labor stability, which is the foundation of §301 of the Labor Management Relations Act.

CONCLUSION

The arguments raised in the Respondents' Brief in Opposition are unpersuasive, and exemplify the need for this Court's review of the important issues presented by the case below. For the reasons stated herein and in its Petition, Petitioner United Food and Commercial Workers Union Local 951 respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

TED IORIO
Counsel of Record
CHRISTINE A. REARDON
KALNIZ, IORIO & FELDSTEIN, CO., LPA
5550 West Central Avenue
Toledo, Ohio 43635-2170
Telephone: (419) 537-1954

Attorneys for Petitioner